

(22,405.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 784.

THE FAIR, APPELLANT,

vs.

KOHLER DIE AND SPECIALTY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

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a In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29726.

KOHLER DIE & SPECIALTY COMPANY

vs.

THE FAIR.

Messrs. Brown & Hopkins, Solicitors for Complainant.
Mr. Walter H. Chamberlain, Solicitor for Defendant.

- 1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaas, Circuit Judge of the United States for the Seventh Judicial Circuit, on Wednesday, the twelfth day of October, being one of the days of the regular July Term of said Court, begun on Monday, the fourth day of July, in the year of our Lord one thousand nine hundred and ten and of our Independence the one hundred and thirty-fifth year.

John H. R. Jamar, Clerk.

- 2 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Chancery. 29726.

KOHLER DIE & SPECIALTY COMPANY

vs.

THE FAIR.

Be it remembered, That on this day to-wit: the tenth day of March, 1910, comes the complainant in the above entitled cause by its solicitor, and by leave of Court first had and obtained, filed in the Clerk's office of said Court its certain Substituted Amended Bill of Complaint in the words and figures following to-wit:

Amended Bill of Complaint.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity. No. 29726.

KOHLER DIE & SPECIALTY Co., Complainant,

vs.

THE FAIR, Defendant.

Amended Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States in and for the Northern District of Illinois, Eastern Division:

And now comes the complainant, leave of Court having been first obtained, and amends its bill of complaint by withdrawing its bill heretofore filed and substituting this, its Amended Bill of Complaint.

Kohler Die & Specialty Co., a corporation duly organized and existing under the laws of the State of Illinois, and having its principal office and place of business at Chicago, County of Cook and State of Illinois, brings this, its bill of complaint, against The Fair, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business and office established at the city of Chicago, County of Cook in the said state, and a citizen and inhabitant of the Northern District of Illinois, Eastern Division, and thereupon, your orator complains and says:

4 1. That heretofore, and before the 6th day of May, 1904, Victor Kost was the sole, original and first inventor of certain new and useful Improvements in Gas Heating Devices not known or used by others before his said invention thereof in this or in any other country, and not patented nor described in any printed publication in this or in any foreign country prior to his said invention or discovery thereof, nor for more than two years prior to the date of filing of his hereinafter named application for his United States Letters Patent hereinafter specified for the said invention, and which invention had not been in public use nor on sale in the United States for more than two years prior to his said application, nor patented in any foreign country on an application filed by him or his representatives or assigns for more than twelve months prior to his said application for the said United States patent, and which invention had not been abandoned; and that being the original, sole and first inventor of the said improvements in gas heating devices, the said Kost made application to the proper department of the United States Government for Letters Patent thereon, in accordance with the then existing laws of Congress in such cases made and provided, which said application was filed on or about the 6th day of May, 1904, and he having complied in all respects with the conditions and requirements of the said laws, and duly sworn to the

specifications and claims of such application for patent, and paying the fees required by law, such proceedings were had that on the 5th day of June, 1906, Letters Patent of the United States for the said invention, under the seal of the Patent Office of the United States, signed by the Commissioner of Patents, or by the Assistant or Acting Commissioner of Patents, and bearing the date last aforesaid and numbered 822,374, were issued in due form of law and delivered to the said Victor Kost, his heirs and assigns, whereby 5 was granted and secured unto said Kost, his heirs and assigns, for the term of seventeen years from the date of said patent the full and exclusive right of making, using and vending to others to be used, the said invention, as by the said Letters Patent, or a duly authenticated copy thereof in Court to be produced will more fully appear, and of which said patent your orator makes profert, a copy of said patent being hereunto annexed and marked "Complainant's Exhibit A."

2. And your orator shows unto your Honors that on or about the first day of July, 1908, the said Victor Kost, by means of an instrument in writing, transferred, sold and set over unto your orator, its successors and assigns, the entire and exclusive right and license to manufacture, use and vend, and license others to manufacture, use and vend, gas heating devices embodying and containing the said invention throughout the United States and territories thereof for the full term for which the said patent was granted, and that in and by said instrument in writing, and as a condition of said license, your orator was and is required to mark the name Kost on each and all of said gas heating devices manufactured or sold by your orator, or your orator's successors or assigns, and that in fact your orator has continuously since the grant of said license, thus marked said name upon all of said devices manufactured or sold by your orator, whereby the said name Kost became, and ever since has been, the generic name for all gas heating devices embodying said invention, and your orator became and still is the exclusive owner of the rights to use said name in connection with the sale of 6 said devices, as by the said written license, or a duly verified copy thereof here in court ready to be produced, will more fully appear.

3. And your orator further shows unto your Honors that it now is and ever since the grant of the said license, and long prior to the time of the infringement of the said patent hereinafter complained of, has been the sole owner of the exclusive right and license of manufacturing, using and vending and licensing others to manufacture, use and vend, the said invention throughout the United States and territories thereof for the full term for which the said patent was granted; that it has put the said invention into public use in various parts of the United States and that the same is of great value and has remained in the exclusive possession of your orator; and your orator has expended large sums of money and gone to great trouble and expense in and about said invention, and is engaged in the business of making and selling gas heating devices made in accordance with and embodying the said invention, and is able to

meet and fill all demands for such devices on the part of the users thereof; and that the public has generally acquiesced in and acknowledged the rights of your orator under the said patent, except for the infringement herein complained of; and your orator further shows unto your Honors that the said defendant was duly notified and given special notice of said patent, notifying defendant of the existence of your orator's exclusive rights under the said patent and of the infringement thereof by the defendant; and that in addition to the said special notice of patent delivered to the said defendant,

7 notice of patent has been given to the public at large of the existence of the said patent by invariably stamping directly upon the gas heating devices manufactured or sold under the said patent by your orator, and by the said Kost since the date of the said patent, the word "Patented," or a word of similar import, together with the date the said patent was granted, or by marking the said notice of patent upon the label, or the box, or the package accompanying or containing the said device when exhibited for sale or sold.

4. And your orator further shows unto your Honors that the said defendant, well knowing the premises and the rights and privileges so as aforesaid secured unto your orator by the said Letters Patent, and conspiring to injure your orator and deprive your orator of the profits, benefits and advantages which might and otherwise would have accrued to your orator from the said patent, has, since the date of the granting of the said patent, and of your orators said license thereunder and since the aforesaid special notice of patent, and before the commencement of this suit, and in various places throughout the United States and territories thereof, and in the Northern District of Illinois, Eastern Division, and in the City of Chicago, in the said District and State of Illinois, where the said defendant has established place of business, unlawfully and without license or permission from your orator, made, used or sold, and is now selling, and threatens to continue to sell to others to be used, a large number of gas heating devices made according to and containing the invention covered by the aforesaid patent, all in violation and infringement of the exclusive rights and privileges granted to your orator under the said patent.

5. Your orator shows unto your Honors that it has a large and profitable business in the manufacture and sale of gas heating devices embodying the said invention, for and to the trade or dealers in

8 Chicago and elsewhere throughout the United States, who in turn sell the same to users or to the public, and that in order that the price thereof to the customers of all of such dealers may be uniform, your orator invariably imposes upon each of said dealers and others to whom your orator sells the said devices, the condition and restriction that none of said devices shall be sold to the public or for use for a price less than one dollar and fifty cents; that notice of this restriction and condition is invariably communicated to each of said dealers or parties purchasing the said devices from your orator as a condition of such sale, and that as a further means of notifying said dealers and parties of such condition and

restriction, and of notifying others who deal with, purchase from, or purpose purchasing from said dealers any of said devices, your orator has invariably and in every instance, securely affixed to each of said devices, or to the boxes or packages containing each of the same when sold or exhibited for sale, a label bearing an illustration of the said device, and containing a special notice of selling restrictions as follows, to-wit:

"Special Notice.

"This gas-jet heater is licensed by us for sale and use only when sold to the public at a price not less than \$1.50. No license is granted to sell it to the public at a less price than \$1.50, or to use it if sold at less than such price. Any sale in violation of this condition, or its use when so sold, will constitute an infringement of our United States Letters Patent No. 822,374, (other patents pending) under which this Gas Jet Heater is constructed, and all parties so selling or using it contrary to the terms of this license will be treated as infringers of said patent and will render themselves liable to an injunction and damages. The license to sell is good only so long as this label remains upon the package, and erasures or removal of this label will be construed as a cancellation of the license. A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

KOHLER DIE & SPECIALTY CO.,

Sole Licensee."

6. Your orator shows unto your Honors that the said defendant was specially notified of the said selling restrictions, and of each and all of the provisions and conditions contained in the notice hereinbefore quoted in the last paragraph, and warned that the said conditions and restrictions would be imposed upon and enforced against the said defendant before the defendant obtained or purchased any of the said devices for sale, that the said defendant is a merchant making a business of selling merchandise to the public at large for use and in the capacity of a merchant the defendant obtained a stock of the said devices, each bearing the special notice hereinabove quoted plainly displayed upon the outside of each box containing the same, and offered the same for sale, and did sell the same, in the city of Chicago, in the Northern District of Illinois, and Eastern Division, for a sum materially less than one dollar and fifty cents each, and that after the said defendant had thus obtained said devices, the defendant was again and repeatedly cautioned and warned against any violation of the conditions and restrictions contained in the said special notice above quoted, and particularly the condition that none of the said devices could be sold to the public or for use for a price less than one dollar and fifty cents without the defendant rendering itself liable to your orator for infringement of the said patent and to an injunction.

7. And your orator further shows unto your Honors that the said

10 defendant, well knowing the premises and the rights and the privileges so as aforesaid, secured unto your orator by the said letters patent, and conspiring to injure your orator and deprive your orator of the profits, benefits and advantages which might and otherwise would have accrued to your orator from the said patent, has, since the date of the granting of the said patent, and of your orator's said license thereunder, and since the aforesaid special notice of patent, and since the aforesaid special notice of restrictions and conditions for the re-sale of the said devices to the public or for use and before the commencement of this suit, and in various places throughout the United States and territories thereof, and in the Northern District of Illinois, Eastern Division, and the City of Chicago, in the said District and State of Illinois, unlawfully and without license or permission from your orator sold, and is now selling and threatens and intends to continue to sell to the public and for use and to users, a large number of said gas heating devices for a price of \$1.25 each and less, made according to and containing the invention covered by the said patent, and bearing upon each thereof, or upon each box containing the same, the aforesaid label containing the aforesaid special notice of selling restrictions, and also bearing thereon and upon said label the public notice aforesaid that the said gas heating device is manufactured under and in accordance with the aforesaid patent, said public notice of patent being stamped plainly upon each of the said devices when thus sold by defendant in words the figures as follows, to-wit: "Pat'd June 5,-06," all in violation and infringement of the exclusive rights and privileges granted to your orator under the said patent, and to the great and irreparable injury to your orator's business in the manufacture and sale of the said devices.

8. And your orator further shows unto your Honors that it has a large number of customers who purchase the said gas heating
11 devices embodying the said invention from your orator under the conditions of the said selling restrictions as displayed upon the said label, and who have generally acquiesced in said conditions
3104 restrictions, and in your orator's rights and privileges under the
3105 patent, and that this violation and infringement of your orator's said rights herein complained of by the said defendant, tends to induce others to violate the said selling restrictions as to the price of said article, and to infringe upon your orator's rights under the said patent, and has actually materially interfered with the lawful sale of the said gas heating devices by your orator to your orator's said customers and prospective customers, and to the trade generally, and has thereby diverted from your orator large gains and profits to which your orator is justly entitled and which would have accrued to your orator but for the unlawful acts of infringement committed by the defendant against your orator's rights as herein complained of.

9. Your orator shows that unless the said infringement of the said patent by the defendant be enjoined or discontinued, your orator will suffer great and irreparable damage and pecuniary loss and injury to its business and good will, for which no action at law would be adequate.

10. And your orator further shows to your Honors that the defendant has sold in the unlawful manner aforesaid and is now offering for sale and intends to sell to the public and to users as aforesaid, a large number of gas heating devices embodying and containing the said invention, and has derived great gains and profits from said infringement, which gains and profits your orator would have derived but for said unlawful acts of said defendant, but as to the exact number of such articles so sold by the defendant your orator is ignorant and as to the exact amount of the gains and profits which the said defendant has derived from such unlawful sale of said devices in infringement of the said patent your orator

is not informed, and therefore your orator prays that the
12 said defendant may be required to make disclosure of the number of said devices sold in infringement of said patent, and the amount of gains and profits derived therefrom by the defendant.

11. And your orator further prays that the defendant may be compelled by a decree of this court to account for and pay over to your orator all such gains and profits as have accrued to and been received by said defendant, and all such gains and profits as your orator may be entitled to by reason of the aforesaid infringement of the said patent, and also such gains and profits as your orator would have received but for the said unlawful acts of the defendant; and in addition to such gains and profits also the damages which your orator has sustained by the said unlawful acts of the defendant; and that the defendant, its clerks, attorneys, agents, servants and workmen, may be perpetually as well as temporarily or provisionally enjoined and restrained by the decree and injunction of this Honorable Court from directly or indirectly making, constructing, using or vending, devices containing or embodying the invention covered by and contained in said patent, and from directly or indirectly selling any gas heating devices, or offering to sell any gas heating devices, or selling or offering for sale gas heating devices of your orator's manufacture and embodying the said invention for a price less than one dollar and fifty cents each; and that the said defendant may be decreed to pay the costs of this suit and may also be enjoined and restrained as aforesaid during the pendency of this suit; and that your Honors, upon rendering the decree for infringement, may proceed to assess, under your direction, in addition to the profits to be accounted for by the defendant, as aforesaid, the damages your orator has sustained by reason of said unlawful acts of the defendant, and that your Honors may in-

crease the actual damages so assessed for the infringement
13 of the said patent to a sum equal to three times the amount of such assessment under the circumstances of the willful and aggravated infringement of the said patent by the defendant; that the defendant may be required by order of this Honorable Court to deliver up to your orator or to the court, all gas heating devices embodying the said invention now in the possession or under the control of the defendant, to be destroyed and that your orator have such other and further relief as the equity of the case may require and to this court may seem meet.

And to the end therefore, that the defendant may, if it can, show why your orator should not have the relief herein prayed, and may full, true, direct and perfect answer make (but not under oath, an answer under oath being hereby expressly waived) to the several matters herein above stated and charged, as fully and particularly as if the same were here repeated and the defendant specially interrogated with reference thereto, and especially that the defendant may set forth whether it has sold or is now selling within the Northern District of Illinois, Eastern Division, or elsewhere in the United States, any gas heating devices containing or embodying the invention aforesaid, or whether it claims so to do under any pretense, grant or license held by it from your orator, or under the said patent, may it please your Honors to grant unto your orator, not only writs of injunction in conformity to this bill, but also writs of subpoena ad respondendum issuing out of and under the seal of this court, directed to the said defendant, The Fair, commanding it to appear and make answer to this bill of complaint and to abide by and perform such order and decree in the premises as to the court shall seem meet and be required by the principles of equity and good conscience.

14 And your orator, as in duty bound, will ever pray, etc.
 KOHLER DIE & SPECIALTY CO.,
 By BROWN & HOPKINS, *Solicitors*.

BROWN & HOPKINS,
Solicitors for Complainant.

(Endorsed:) Filed March 10, 1910, H. S. Stoddard, Clerk.

15 And on to-wit: the sixteenth day of March, 1910, comes the defendant in said entitled cause by its solicitor and enters its special appearance for the sole and only purpose of objecting to the jurisdiction in words and figures following to-wit:

Special Appearance of the Defendant.

In the United States Circuit Court, Northern District of Illinois,
 Eastern Division.

In Equity.

KOHLER DIE & SPECIALTY CO.

vs.

THE FAIR.

The clerk of the Court will please enter the special appearance of The Fair for the sole and only purpose of objecting to the jurisdiction.

THE FAIR,
 By WALTER H. CHAMBERLIN,
Attorney for the Sole and Only Purpose Aforesaid,
 1543 Marquette Building, Chicago.

Chicago, Ill., March 17, 1910.

(Endorsed:) Filed March 16, 1910. H. S. Stoddard, Clerk.

16 And on the same day to-wit: the sixteenth day of March, 1910, came the defendant in said entitled cause by its solicitor and filed in the clerk's office of said Court its certain Special Plea to the Jurisdiction in words and figures following to-wit:

Special Plea to the Jurisdiction.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity.

KOHLER DIE & SPECIALTY COMPANY

vs.

THE FAIR.

The special plea of The Fair to the amended bill of complaint of Kohler Die & Specialty Company, complainant, interposed and filed herein for the sole and only purpose of raising the question of jurisdiction.

The Fair by protestation, not confessing or acknowledging all, or any of the matters and things in the said complainant's amended bill of complaint, mentioned and contained, to be true, in such sort, manner, and form, as the same are therein set forth and alleged, for special jurisdictional plea to the whole of said bill, says that:

The said complainant and The Fair are each and both citizens of the State of Illinois; that The Fair has never manufactured any of the devices referred to in the amended bill of complaint herein; that the complainant has fixed a price at which it would sell the devices referred to in the amended bill of complaint to jobbers; that each and every such device which has been sold or offered for sale by The Fair was purchased by a jobber from the complainant; that

the jobber paid to the complainant the full price demanded
17 for each and every of such articles and resold them to The

Fair and that The Fair has never sold or offered for sale any of such devices except those which the complainant has received the full price demanded for them; that The Fair has never used any of the devices referred to in the amended bill of complaint, except those purchased as aforesaid; that the Circuit and Superior Courts of the State of Illinois are courts of general jurisdiction, and that such courts have full jurisdiction of all controversies arising between citizens of the State of Illinois, except in particular cases, specially reserved under the constitution of the United States, and the acts of the Congress of the United States, to the federal tribunals; that the sole and exclusive jurisdiction, for the determination of all questions herein between citizens of the same state, is vested in the aforesaid courts of general jurisdiction of the State of Illinois, where the controversy, as in this case, arises between citizens of that state; that if the said complainant apprehends itself aggrieved touching the matters alleged in the amended bill of complaint

herein, it ought to appeal to, and seek redress concerning the same from the aforesaid courts of general jurisdiction of said State of Illinois, which courts are, as The Fair submits, the proper forums to decide and determine the said matters; that under the aforesaid facts no question is presented for adjudication, arising under the patent laws of the United States, or under the constitution of the United States, or any act of the Congress of the United States; all which matters and things The Fair is ready to aver, testify, maintain and prove, as this Honorable Court shall order and direct, and, therefore, The Fair demands, and most humbly prays, the judgment of this Honorable Court, whether it should be compelled to make any further answer to the said amended bill of complaint, and prays, on the ground of lack of jurisdiction in this court, to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

18

THE FAIR,
By E. J. LEHMAN,
Vice-President.

Attest:

O. W. LEHMAN,
Ass't Secretary. [SEAL.]

UNITED STATES OF AMERICA,

*Eastern District of Ill.,**State of Illinois, County of Cook, ss:*

E. J. Lehman and O. W. Lehman, being each severally and duly sworn, doth depose and say: E. J. Lehman, that he is the vice-president of The Fair, and O. W. Lehman, that he is the Assistant and acting secretary of The Fair, and that each of them, as such respective officers executed the foregoing plea in behalf of The Fair, and they, and each of them, further say, that the facts contained in the foregoing plea are true, in point of fact, to the best of their and each of their, information and belief, and that said plea is filed and interposed in good faith, to raise the question of jurisdiction, and is not interposed and filed for purposes of delay.

E. J. LEHMAN.
O. W. LEHMAN.

Subscribed and sworn to before me, this 16th day of March, A. D. 1910.

[SEAL.]

CURTIS S. POWELL,
Notary Public for Cook Co., Illinois.

19 I hereby certify that the foregoing plea is drawn in the above entitled suit, and interposed therein, for the sole purpose of raising the question of jurisdiction, and that, in my opinion, it is well founded in point of law.

WALTER H. CHAMBERLIN.

(Endorsed:) Filed March 16, 1910. H. S. Stoddard, Clerk.

20 And on to-wit: the fourth day of April, 1910, being one of the days of the regular December, 1909, term of said court, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of April 4, 1910, Denying Motion to Strike Special Plea from the Files.

29726.

KOHLER DIE & SPECIALTY COMPANY

vs.

THE FAIR.

This cause having come on to be heard on a motion to strike defendant's special plea from the files on the ground that a demurrer was a proper pleading, and the Court being duly advised, it is ordered that the said motion be and hereby is denied.

21 And on the same day to-wit: the fourth day of April, 1910, being one of the days of the regular December, 1909, term of said court, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of April 4, 1910, Overruling Special Plea for Insufficiency. Ten Days in Which to File Answer.

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KOHLER DIE & SPECIALTY COMPANY

vs.

THE FAIR.

This cause having come on to be heard on the special plea of the defendant and having been set down for argument, and the Court being duly advised in the premises, it is ordered that said special plea be and the same is hereby overruled for insufficiency, and the defendant is given ten days in which to file its answer.

22 And on to-wit: the second day of May, 1910, being one of the days of the regular December, 1909, term of said Court, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of May 2, 1910: Amended Bill of Complaint Taken Pro Confesso.

29726.

KOHLER DIE & SPECIALTY CO.

VS.

THE FAIR.

Whereas, in pursuance of an order entered by me in this cause on the 4th day of April, A. D. 1910, the defendant is in default in filing its Answer, it is ordered that the amended bill of complaint filed herein be taken *pro confesso*.

23 And on to-wit: the twelfth day of October, being one of the days of the regular July, 1910, term of said Court, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Decree Pro Confesso of October 12, 1910.

29726.

KOHLER DIE & SPECIALTY COMPANY

VS.

THE FAIR.

This cause coming on to be heard in the presence of counsel for the complainant, and it appearing to the court that the subpoena issued in this cause was duly served upon the defendant, and that the time for appearance by the defendant has long since expired and no appearance except the special appearance for the sole and only purpose of objecting to the jurisdiction has been entered, on motion of counsel for the complainant, it is

Ordered, adjudged and decreed that the Amended Bill of Complaint in the cause be and the same is hereby taken as confessed by the defendant; and it is further

Ordered, adjudged and decreed that Letters Patent, referred to in the Amended Bill of Complaint, No. 822,374, granted June 5, 1906, to Victor Kost, of Chicago, Illinois, is good and valid in law as respects claims 1 to 15 inclusive therein specified and that the said Victor Kost was the true, original and first inventor of the invention and improvements described and claimed in the aforesaid claims in said Letters Patent; that Kohler Die & Specialty Company, complainant has sufficient title and interest in the patent to maintain this suit and, that the said The Fair, defendant herein, has infringed upon claims 1 to 15 inclusive of said Letters Patent, and upon

24 the exclusive rights of the complainant under the same as charged in the Amended Bill of Complaint; And it is further

Ordered, adjudged and decreed, that the parties having waived a

reference and accounting, the complainant recover from the defendant the sum of one dollar (\$1.00) as damages and profits; And it is further

Ordered, adjudged and decreed, that the said complainant do recover of the defendant its costs and charges and disbursements in this suit amounting to forty-five dollars and eighty-seven cents (\$45.87) and it is further,

Ordered, adjudged and decreed, that a perpetual injunction be issued in this suit against the said defendant, restraining it, its agents, clerks, servants and all claiming or holding under or through it, from making, using or selling, or in any way disposing of gas heating devices embracing the invention or improvement described and claimed in said Letters Patent, pursuant to the prayer of the said Amended Bill of Complaint.

25 And on to-wit: the Eighth day of November, 1910, came the defendant in said entitled cause by its solicitor and filed in the clerk's office of said Court its certain Petition for Appeal in words and figures following to-wit:

Petition for Appeal.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity. No. 29726.

KOHLER DIE & SPECIALTY COMPANY, Complainant,
vs.

THE FAIR, Defendant.

Petition for Appeal.

The above named defendant conceiving itself to be aggrieved by the decision of this Court that it had jurisdiction of the subject matter of this cause and by the final decree entered herein on the 12th day of October, 1910, in pursuance of such decision does hereby appeal from said final decree of October 12, 1910, to the Supreme Court of the United States upon the said question of jurisdiction for the reasons specified in the assignment of errors this day filed herein; and it prays that this appeal may be allowed, that said question may be certified to the Supreme Court by the Certificate filed herewith and that a Transcript of Record and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

THE FAIR,
By WALTER H. CHAMBERLIN,

Its Solicitor.

Chicago, October 21, 1910.

(Endorsed:) Filed Nov. 8, 1910. John H. R. Jamar, Clerk.

26 And on the same day to-wit: the Eighth day of November, October, 1910, came the defendant in said entitled cause by its solicitor and filed in the clerk's office of said Court its certain assignment of errors in words and figures following to-wit:

Assignment of Errors.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity. No. 29726.

KOHLER DIE & SPECIALTY COMPANY, Complainant,
vs.
THE FAIR, Defendant.

Assignment of Errors.

I. That the Court erred in holding herein that it had jurisdiction of the subject matter of this cause.

II. That the court erred in overruling the plea to the jurisdiction of the defendant filed herein March 16, 1910.

III. That the court erred in not sustaining said plea to the jurisdiction and dismissing the bill of complaint for lack of jurisdiction.

THE FAIR,
By WALTER H. CHAMBERLIN,
Its Solicitor.

(Endorsed:) Filed Nov. 8, 1910. John H. R. Jamar, Clerk.

27 And on to-wit the eighth day of November, 1910, there was filed in the clerk's office of said Court in said entitled cause a certain Certificate in words and figures following to-wit:

Certificate.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity. No. 29726.

KOHLER DIE & SPECIALTY COMPANY, Complainant,
vs.
THE FAIR, Defendant.

Certificate.

The substituted amended Bill of Complaint herein having been filed March 10, 1910, and the defendant having entered its appearance solely for the purpose of contesting the jurisdiction of

this Court; and a special plea to the jurisdiction having been filed by the defendant on the 13th day of March, 1910; and said special plea having been set down for argument and counsel for both parties having been heard thereon; the Court having entered an order on April 4th, 1910 overruling the special plea of the defendant and ordering it to answer; and defendant having failed to answer within the time specified by said order and making no further appearance in this cause; and the final decree having been entered herein on October 12th, 1910, granting an injunction against the defendant:

28 Now therefore, This Court, pursuant to the second paragraph of the Fifth Section of the Act of Congress approved March 3, 1891, and entitled: "An Act to establish the Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," hereby certifies to the Supreme Court of the United States that in the above entitled cause the jurisdiction of this Court of the subject matter was the sole question in issue, and was decided adversely to the defendant, and that by reason thereof, and not otherwise, the final decree of October 12th, 1910, shown in the record herein, was entered; and that pursuant to said Act above mentioned the following question is hereby certified to the Supreme Court of the United States:

Whether this Court based on the record herein had jurisdiction of the subject matter of this cause.

(Endorsed:) Filed Nov. 8, 1910. John H. R. Jamar, Clerk.

29 And on to-wit: the eighth day of November, 1910, being one of the days of the regular July 1910, term of said Court, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of November 8, 1910, Allowing an Appeal.

29726.

KOHLER DIE & SPECIALTY COMPANY
VS.
THE FAIR.

Now comes the defendant by its solicitor and it appearing to the Court that the petition for appeal and assignment of errors have been filed herein,

It is Ordered that an appeal to the Supreme Court of the United States from the final decree entered herein on October 12, 1910, be, and the same is allowed upon the question of the jurisdiction of this Court over the subject matter of this cause, as prayed; and that for the purpose of enabling the Supreme Court to decide this ques-

tion a transcript of the entire record herein be forthwith transmitted to the Supreme Court, and that the complainant file its appeal bond in the sum of three hundred dollars (\$300) with American Surety Company of New York as surety.

30 And on to-wit: the eighth day of November, 1910, there was filed in the clerk's office of said Court in said entitled cause a certain Memorandum of Opinion in words and figures following to-wit:

Memorandum of Opinion.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity. No. —.

KOHLER DIE & SPECIALTY COMPANY, Complainant,
vs.
THE FAIR, Defendant.

The Court of Appeals for this Circuit in Victor Company vs. The Fair, 123 Fed. Rep., 424, held that the subject matter of the plea inserted in this cause only presented a question within the patent laws and covered by them. Such decision settled the law for this Court. Following that decision the plea herein inserted was overruled. Under such circumstances I must refuse a formal certificate upon the question of jurisdiction. No proceedings did occur in this case, however, on the part of the defendant except the filing of the plea which the defendant claims is a plea to the jurisdiction.

KOHLSAAT, C. J.

(Endorsed:) Filed Nov. 8, 1910. John H. R. Jamar, Clerk.

31 And on to-wit: the eighth day of November, 1910, came The Fair as principal and American Surety Company of New York, as surety and filed in the Clerk's office of said Court in said entitled cause a certain Bond on Appeal, in words and figures following to-wit:

Know all men by these presents that we, The Fair a corporation of Illinois having its principal office in Chicago, Illinois, and American Surety Company of New York, as surety, are held and firmly bound unto Kohler Die & Specialty Company in the full and just sum of three hundred dollars (\$300) to be paid to the said Kohler Die & Specialty Company, and successors or assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of October, 1910.
Whereas lately, at the July 1910, term of the Circuit Court of the

United States for the Northern District of Illinois, Eastern Division in a suit pending in said Court between the said Kohler Die & Specialty Company as complainant and The Fair as defendant, a decree was entered granting an injunction against the said The Fair, defendant, and said The Fair *has* obtained an order of appeal of the said Court to reverse the decree in the aforesaid suit and a citation directed to said Kohler Die & Specialty Company citing and admonishing it to be and appear in the Supreme Court of the United States thirty (30) days from and after the date of said citation:

32 Now the conditions of the above obligation are such, that if The Fair shall duly prosecute its said appeal with effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

THE FAIR,

By E. J. LEHMAN, *Vice President*.
AMERICAN SURETY COMPANY OF
NEW YORK,

[SEAL.]

By R. R. GILKY, *Res. Vice Pres't*.
ROBERT F. BENNETT, *Res. Ass't Sec'y*.

Attest:

[SEAL.] CHARLES GREVE.

Approved: Nov. 8, 1910.

KOHLSAAT, *Judge*.

(Endorsed:) Filed Nov. 8, 1910. John H. R. Jamar, *Clerk*.

33

Præcipe for Transcript of Record.

In the United States Circuit Court, Northern District of Illinois,
Eastern Division.

In Equity. No. 29726.

KOHLER DIE & SPECIALTY COMPANY, Complainant,

vs.

THE FAIR, Defendant.

Præcipe for Record.

To the Clerk of the above entitled Court:

You will please prepare a Transcript of Record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States under the appeal heretofore perfected to said court and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

Substituted Amended Bill of Complaint,
 Special Appearance,
 Special Plea to the jurisdiction,
 Order of April 4, 1910, denying motion to strike special plea
 from files,

Order of April 4, 1910, overruling special plea,
 Order of May 2, 1910, taking bill pro confesso,
 Final Decree of October 12, 1910,
 Petition for Appeal,
 Assignment of errors,
 Certificate,
 Order allowing appeal,
 Opinion,
 Bond.

THE FAIR,
 By WALTER H. CHAMBERLIN,
Its Solicitor.

Chicago, November 9, 1910.

(Endorsed:) Filed Nov. 9, 1910. John H. R. Jamar, Clerk.

34 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court, made in accordance with Præcipe filed in the cause entitled Kohler Die & Specialty Company vs. The Fair, as the same appear from the original Records and Files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this Eleventh day of November, 1910.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

JOHN H. R. JAMAR, *Clerk.*

35 UNITED STATES OF AMERICA, *ss:*

To Kohler Die & Specialty Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, entered and filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, wherein The Fair is the appellant, and you are Appellee, to show cause, if any there be, why the Decree rendered against the said Appellant as in the said Order mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaatt, Circuit Judge of the United States for the Seventh Judicial Circuit this Eighth day of November, in the year of our Lord one thousand nine hundred and ten.

KOHLSAAT, *Judge.*

36 [Endorsed:] No. 29726. Supreme Court of the United States. Kohler Die & Specialty Co. vs. The Fair. Citation to the Supreme Court of the United States. Circuit Court of the United States, Northern District of Illinois, Eastern Division. Filed Nov. 10, 1910. John H. R. Jamar, Clerk.

On this — day of — in the year of our Lord one thousand nine hundred —, personally appeared — before me, the subscriber, — and makes oath that he delivered a true copy of the within citation to —.

— —.

Sworn to and subscribed the — day of —, A. D. 19—. Copy received Nov. 10th, 1910.

BROWN & HOPKINS,
Sols. for Kohler Die & Specialty Co.

Endorsed on cover: File No. 22,405. N. Illinois C. C. U. S. Term No. 784. The Fair, appellant, vs. Kohler Die & Specialty Company. Filed November 16th, 1910. File No. 22,405.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. 784.

THE FAIR,

Appellant,

vs.

KOHLER DIE & SPECIALTY COMPANY,

Appellee.

Motion to Advance.

Now comes the appellant and moves this court for an order advancing this case upon its calendar so that it will be heard upon oral argument immediately following the case of *Dick v. Henry*, No. 175; and as the facts, the reasons and the objects of this motion, begs to state to this court as follows:

The case of *Dick v. Henry* is here upon *certiorari* and practically presents the question involved in the so-called Button Fastener case (*Heaton-Peninsular Button Fastener Company v. Eureka Specialty Company*, 77 Fed., 288) to-wit: The power of the patentee by placard upon his patented article to limit the use of such article; while in this case the question is whether the patentee is such a czar that he may limit by placard under the patent act the resale price *ad infinitum* of his patented article, as was announced in *Victor Talking Ma-*

chine Co. v. The Fair, 123 Fed., 424. Neither of these questions has ever been directly passed upon by this court.

In the case at bar, the parties are citizens of the same state. A bill was filed below in the ordinary form for patent infringement. The sole tort shown by the record was the violation of the placard on complainant's article. The defendant appeared specially to the jurisdiction and pleaded specially to the jurisdiction. No further proceedings were had in the cause, except a decree as upon default. Hence the sole question involved was one of jurisdiction and the appeal to this court was allowed upon that ground only.

This record (less than twenty pages) not only presents the rights of the parties to this suit, but it also involves the jurisdiction of the lower Federal courts; the powers of all patentees; the rights of purchasers from them; and the rights of the purchasing public. This question has arisen many times in the lower Federal tribunals and, it is self-evident, needs an authoritative decision from this court, which will finally settle the rights of parties under the patent statutes.

As the sole question involved is one of jurisdiction, under the rules and practice of this court it will be advanced as a matter of right.

We most respectfully submit that the case should be argued orally and that such argument should immediately follow the case of *Dick v. Henry*. If this court *ex gratia* should refuse the oral argument and require submission on brief, then we most humbly request a decision at the earliest possible date.

WALTER H. CHAMBERLIN,
D. S. WEGG,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. 784.

THE FAIR,	}
<i>Appellant,</i>	
<i>vs.</i>	
KOHLER DIE & SPECIALTY COMPANY,	}
<i>Appellee.</i>	

GENTLEMEN :

Please take notice that on January 30th, 1911, at 12 o'clock noon, or as soon thereafter as the court will hear the same, we will move for an order advancing the hearing of the above entitled cause, under Rule 32 of the Rules of Practice of the Supreme Court of the United States.

Respectfully, etc.,

WALTER H. CHAMBERLIN,

D. S. WEGG,

Counsel for Appellant.

To BROWN & HOPKINS,

Counsel for Appellee.

Service of a copy of the attached motion together with copy of appellants' brief acknowledged this ninth day of January, 1911.

BROWN & HOPKINS,

Counsel for Appellee.